84-729

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM, 1984

J. D. PORTER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court of Appeals for the Fourth Circuit

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Petition for a Writ of Certiorari to the Supreme Court of the United States of America

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QUESTIONS PRESENTED

1. WHETHER THE COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE PROSECUTION TO CROSS-EXAMINE A WITNESS, MABEL WAGONER, AS TO WHETHER SHE HAD BEEN OFFERED MONEY TO TESTIFY BY DEFENDANT.

2. WHETHER THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GRANT DEFENDANT'S MOTIONS FOR DISMISSAL OF THE CHARGES AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE AND AT THE CLOSE OF ALL THE

EVIDENCE.

3. WHETHER THE COURT COMMITTED PREJUDICIAL ERROR BY NOT GIVING A CURATIVE INSTRUCTION AFTER THE PROSECUTION'S IMPROPER AND PREJUDICIAL REMARKS IN HIS CLOSING ARGUMENT.

4. WHETHER THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY CONCERNING THE NEED TO FIND THE ELEMENT OF "COUNTERFEIT".

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The opinion rendered by the United States Court of Appeals for the Fourth Circuit, filed September 5, 1984, is hereby attached and designated as the Appendix to this Petition for Writ of Certiorari.

JURISDICTION

The Petitioner, J. D. Porter, is charged pursuant to a Bill of Indictment filed September 14, 1983 for violation of Title 18, U. S. Code, § 473. Petitioner was tried in the United States District Court for the Western District of North Carolina before the Honorable Robert D. Potter, United States District Court Judge, on November 29, 1983 with a jury. The Petitioner was convicted and by Judgment entered December 1, 1983, sentenced to six years. The Petitioner gave notice of appeal to the United States Court of

Appeals for the Fourth Circuit. His case was decided on September 5, 1984 by the Honorable Judges Phillips, Murnaghan and Ervin, affirming the district court. Petitioner hereby petitions the Supreme Court of the United States for a writ of certiorari, pursuant to Tile 28, U. S. Code, § 2101.

STATEMENT OF THE CASE

The Defendant was indicted by virtue of a true bill being returned by the foreman of the grand jury on October 4, 1982, charging Defendant with buying counterfeited obligations or securities of the United States with the intent of passing or publishing the obligations or securities. Defendant entered a plea of not guilty to the charge at the trial and after trial he was found guilty and given a six year active sentence by the court.

Defendant objected and excepted to

the entry of the verdict and gave notice of appeal to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. This being signed by Defendant and counsel on December 3, 1983, and filed in the office of the Clerk of the United States District Court on December 7, 1983.

The testimony of Thomas Faw tended to show that Cody Hice approached him and David Mills about printing counterfeit money. Faw helped obtain the printing press while Cody Hice secured the paper for the press. Faw, Mills and the Hices spent a weekend printing the money on regular 20 Bond paper which was unsuitable for the purposes of printing. The money was to be sent to California by a man who drove a Cadillac. Faw testified on cross-examination that people familiar with money would easily spot the bills as counterfeit.

David Dale Mills testified that he ran the press and that a lot of the money was no good. He testified that the money was to be sold out west and Cody Hice was arranging the sale. On cross-examination he testified that he never saw J. D. Porter and that the bills were not passable.

Gene Jenkins testified that he loaned Ray Hice $5,000 after Hice told him that he (Ray Hice) was thinking about making money. Jenkins went with Mills to Winston-Salem, North Carolina to see about buying the press. He testified on cross-examination that he had never seen J. D. Porter around the press.

Ray Hice testified that he decided to make money after having financial difficulties and involved Gene Jenkins and Cody Hice in the conspiracy. He said that he sold J. D. Porter, who he knew

from making gasohol, $108,000 in counterfeit for $7,200. He testified that the defendant was with him when he rented a U-Haul to carry the press to the barn. He testified that nobody saw him transfer the counterfeit money to the defendant. He also testified that Porter had never driven a Cadillac to his home.

Ray Sturgill testified that he had a record of renting a U-Haul to a J. D. Porter but did not actually rent the trailer or know who rented it. William Ensley testified that he went west with Danny Mathis who had allegedly bought the money from J. D. Porter to pass the money and that he brought $50,000 in unpassable money back to North Carolina. He testified that Porter told him he would return $10,000 to Danny Mathis.

Ronald House, a Secret Service Agent, testified that he found the printing press

in a barn behind a trailer. He also found two pieces of counterfeit money in the press. He found pieces of mail with the defendant's name on it in the barn. He testified that the serial numbers on the bills were the same. He testified that Ray Hice told him that he had sold the defendant counterfeit money. He testified that the barn which housed the press was about 1/4 mile from J. D. Porter's house. At the close of the Government's evidence, the Defendant's counsel moved for a dismissal of all charges, which was denied and Defendant took exception.

J. D. Porter testified that he knew Ray "Broyhill" and Cody "Broyhill" and that they had come to his house driving a Scout and pulling a U-Haul. He testified that he did not know Ensley or Mathis; that he never went to the Hices or

"Broyhills" to buy counterfeit money; that he never owned a Cadillac; and that he never sold any counterfeit money. He testified that he had never been to the Hices' home and that the mail must have been thrown into the barn where the press was found by his sister who lived near the barn and received his mail. Mr. Porter testified that he rented the U-Haul for Ray Hice so that Hice could transport some barrels for gasohol that the defendant had made for him.

Beulah Hemrick, who did laundry for Mr. Porter, testified that she saw Mr. Porter helping Ray "Broyhill" Hice and some other men load heating equipment into the U-Haul. John William Smith also testified that he saw the defendant loading heaters into the U-Haul. Mabel Wagoner confirmed that she had seen Mr. Porter loading barrels into the U-Haul.

On cross-examination the prosecutor said:

"Q. This is a delicate question, but has anyone offered you money to testify here today?

A. No, sir, no, sir.

Q. And, Ms. Wagner, Isn't it true that sometime within the last very few days you've been offered $4000.00 for your testimony?

A. No, sir, no, sir, no, sir, have not."

The defense counsel objected and the court called the attorneys to the bench.

"Now, the defense attorney, Mr. Smith, passionately pled to you that he wants Mr. Mathis here, who bought the money from J. D. Porter. Where is Mr. Mathis? He getting off scott free. Mr. Mathis is serving a seven-year prison sentence."

Defense counsel's objection was sustained.

". . . and I'll tell you what makes me mad is the fact that I had good reason to believe and, therefore, I had a duty to ask and put it before you that one of the witnesses, Ms. Wagner, had been paid for her testimony. It makes me madder that that happened than that I had to mention it. I had a duty to mention it. I had good reason to believe that she'd been offered money for her testimony.

This argument was allowed over the objection of defense counsel.

ARGUMENTS

This case should be reviewed on writ of certiorari pursuant to Rule 17 of the Rules of the Supreme Court of the United States, for the reasons that the United States Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of another federal court of appeals, has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision, and, finally, has decided a federal question in a way in conflict with applicable decisions of this Court.

I. THE COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE PROSECUTION TO CROSS-EXAMINE A WITNESS, MABEL WAGONER, AS TO WHETHER SHE HAD BEEN OFFERED MONEY

TO TESTIFY FOR DEFENDANT.

In its opinion in this case the Court of Appeals relied upon U. S. v. Fowler, 465 F.2d 664 to hold that the cross-examination of Mabel Wagoner was not improper. However, the Court failed to note the remainder of the paragraph from which it quoted which is crucial to this case. In Fowler, supra, the Court stated:

> A reasonable amount of exploratory questioning should be allowed, based on slight suspiciion . . . We do not mean to indicate that either counsel on cross-examination may, without a reasonable basis therefor, ask direct questions which tend to incriminate or degrade the witness and thus plant an unfounded bias in the minds of jurors which subsequent testimony cannot entirely displace. To authorize such cross-examination the general rule is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates. If this rule is breached, the violator should be severely censured. Such practice is impermissible and should not be tolerated. At the same time where counsel has some basis, even though it may be very slight, he may

> ask nonaccusatory questions regarding convictions or conduct of this type in a good faith attempt to impeach the witness. 465 F.2d, at 666.

In Fowler, supra, the Court of Appeals for the District of Columbia held that the trial court unduly restricted the defense counsel's right to cross-examine the chief Government witness when the trial court refused to allow him to question the witness at all about his suspicion of narcotics use. As pointed out by the Court, a certain amount of exploratory nonaccusatory questioning, which was italicized by the Court, is necessary. However, in the case at bar, the prosecutor went beyond this by asking, after the witness had denied receiving money, whether she had not been offered $4000.00 in the last few days. This strongly insinuated that the prosecutor knew as a concrete fact that the witness had been bribed and

planted a bias in the minds of the jury which would be extremely difficult to erase. The prosecutor went beyond exploratory questioning to the point of accusation.

Although the prosecutor supplied the trial court with a sealed document giving the basis for his suspicion, it was after the bias had been planted and it was too late for the court to correct any error. The sealed document was never provided to the Court of Appeals in order for them to evaluate the strength of the suspicion. This improper questioning and procedure has effectively denied petitioner his right to due process and his right to confront those witnesses against him, requiring a reversal of the Court of Appeals.

II. THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GRANT DEFENDANT'S

MOTIONS FOR DISMISSAL AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE.

Title 18, U. S. Code, Section 473, states as follows:

> Whoever buys, sells, exchanges, transfers, receives or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000, or imprisoned no more than ten years, or both."

The trial court is required to grant a motion for dismissal when there is no evidence upon which a reasonable person might fairly conclude guilt beyond a reasonable doubt. Curley v. United States, 160 F.2d 229, 232, 233, cert. denied 331 U.S. 837 (D.C. Cir. 1947). Justice Stewart of the United States Supreme Court cited this test as "the prevailing criterion for judging motions for acquittal in federal criminal trials." Jackson v.

Virginia, 442 U.S. 307, 318 n. 11, citing Wright (1979).

An element of the crimes with which defendant was charged requires that the bills be "counterfeited". 18 U.S.C. § 473 (1948). The Fourth Circuit Court of Appeals ruled that the word "counterfeited" means a "simlitude, without which there is no counterfeit" in United States v. Smith, 318 F.2d 94, 95 (4th Cir. 1963). The Court went on to hold that: "Here the slips do not have the appearance of an obligation of the United States. There is scarcely a resemblance, much less an imitation. They are just too crude to mislead--an undisguised and rude forgery. The quality of the paper alone proclaims them spurious. Hence they are not 'counterfeited' in fact." Id. This test was cited with approval in United States v. Johnson, 434 F.2d 827, 830 (9th Cir.

1970). The bill must bear such a resemblance to a genuine bill as to be calculated to deceive "an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." United States v. Lustig, 159 F.2d 798, 802 (3d Cir. 1947), rev'd on other grounds 338 U.S. 74 (1949).

The bills offered by the prosecution failed to meet the test for counterfeit set forth in Smith. Mr. Thomas Faw testified that the bills were "easily detectible as counterfeit money" and was "not passable." Mr. David Mills testified that the bills were printed on "regular 20-Bond paper" and were not passable. Mr. Darrell Lipford also testified that his brother was caught immediately when he attempted to pass the bills. Cody Hice testified that the bills all carried

"the same serial number, the same format, the same paper" and that there were "a lot of flaws" in the bills. On cross-examination he testified that he "didn't think it (the bills) was that good" and therefore he did not use it to pay off his creditors.

David Mills later testified on voir dire that the bills presented by the Government which were "chewed up" and that he would not buy a suitcase full of those bills.

That the trial judge gave great weight to the fact that the Government agent testified that bills bearing the same serial number had been passed through the federal treasury without any connection with any direct or circumstantial evidence that the bills passed through the various banks were part of the bills that were printed by the co-defendant in

this case. However, the prosecution failed to demonstrate that the bills in the instant case were "counterfeit" as defined by this Court in Smith or that the bills entered into evidence were connected in any way with the bills received by the Federal Reserve. Therefore, the trial court erred in failing to grant defendant's motions for dismissal of the charges.

III. THE COURT COMMITTED PREJUDICIAL ERROR BY NOT GIVING A CURATIVE INSTRUCTION AFTER THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REMARKS TO THE JURY.

The leading case on this issue is Berger v. U.S., 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935) in which the prosecutor insinuated that he had personal knowledge of a witness's pretending not to recognize the Defendant and attacked the defense counsel's tactics, implying that his

objections to prosecutor's argument was for improper reasons. In commenting on the conduct of the prosecutor, the Court stated:

> That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record." 295 U.S., at 84.
>
> The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." 295 U.S., at 85.
>
> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a

> peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor --indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. 295 U.S., at 88.

The Court of Appeals in this case clearly decided this issue in conflict with Berger, supra. The prosecutor in this case clearly overstepped the bounds of fairness and added water to the seeds he had already planted in the minds of the jury during his cross-examination of Mabel Wagoner. Although the Court of

Appeals excuses the misconduct of the prosecutor as merely a response to defense counsel's closing argument, this is contrary to the cases in other federal courts of appeal.

In Angel v. Overberg, 664 F.2d 1052 (1982), a case from the Court of Appeals for the 6th Circuit in which the prosecutor like the prosecutor in this case accused a defense witness of lying during his closing argument, the Court stated that such comments are "contrary to the never shifting burden of proof imposed upon the state in a criminal case." 664 F.2d, at 1054-55. The Court also points out:

> The prosecutor is ordinarily accorded great latitude in making his closing argument and may properly rebut and make fair response to argument made by defense counsel. (Citations omitted). There is a difference, however, between permissible rebuttal of impassioned remarks made by defense counsel and abuse by

> the prosecutor of his opportunity to convince the jury to sift and order the facts in concert with his own view of the case." 664 F.2d, at 1056.

Petitioner believes that the view expressed by the 6th Circuit in Angel, supra, the prosecutor's comments are given great weight by the jury and he should therefore restrict his remarks to avoid tainting the trial and his office. In the case at bar, the prosecutor went beyond rebuttal to insinuations of personal knowledge of bribery of a defense witness and imprisonment of a key witness, implicitly for this same offense. The strength of his argument could not have been overcome, no matter how vehemently the witness denied bribery. The subtlety of the prosecutors remarks go beyond accusing a defense witness of lying but indirectly accuse the Defendant of bribery, leaving the jury with the impression of guilt.

His comments concerning Mr. Mathis leave the same impression.

In King v. U.S., 372 F.2d 383 (1966), a case from the Court of Appeals for the District of Columbia, the prosecutor mislead the jury in his closing argument concerning a crucial defense witness's testimony. The Court reversed and remanded the case for a new trial, stating that:

> Perhaps the situation could have been saved if the judge had stepped in, on his own initiative as well as on protest of defense counsel. A trial judge is understandably disinclined to depart from a more passive role as arbiter of an adversarial conflict, lest he perhaps unwittingly interfere with effective development of a case. But a cautionary warning in time to the prosecuting attorney, followed by control if necessary, would help both the defendant whose rights are protected directly and the Government whose case will otherwise run aground in the shoals of the prosecutor's conduct. 372 F.2d, at 396.

In the case at bar the combined weight of the accusatory questions during

cross-examination of Mabel Wagoner and the insinuations during closing argument concerning Mr. Mathis and Ms. Wagoner clearly prejudiced the rights of the Defendant to a fair trial. Because of the several insinuations by the Government, the trial court should have given a curative instruction and even reprimanded the prosecuting attorney for such a blatant violation of his duty as an officer of the Court as set forth in Berger, supra.

As stated in the often-cited case of Miller v. N. C., 583 F.2d 701 (1978), involving a charge of rape and a defense of consent in which the prosecutor made a racially-biased argument:

> Nothing is more fundamental to the provision of a fair trial than the right to an impartial jury. The impartiality of the jury must exist at the outset and it must be preserved throughout the entire trial.
>
> A prejudicial argument by the prosecutor poses a serious threat to a fair trial, not only does it undermine the jury's impartiality,

> but it also disregards the prosecutor's responsibility as a public officer. 583 F.2d, at 706.

The Court of Appeals in this case relies on the fact that the evidence against the defendant was strong in holding that none of these errors were prejudicial. However, the only direct evidence against the defendant was the testimony of two co-defendants. Therefore, the case revolved around the credibility of two co-defendants against the credibility of defendant and his witnesses.

In reversing and remanding the case for a new trial in Miller, supra, the Court states:

> There remains only the question of whether this constitutional deprivation was harmless error. In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), the Supreme Court observed that there might be some errors of constitutional magnitude that might, in a particular case, be so unimportant and insignificant as to be harmless. An error could not be so classified, however,

> unless the reviewing court were able to say, beyond a reasonable doubt, that there was no reasonable possibility that the disputed evidence might have contributed to the conviction. 386 U.S. at 23-24, 87 S.Ct. 824. And the Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless." 386 U.S. at 23, 87 S.Ct. at 827. We do not think that there was harmless error in the instant case.
>
> First, we cannot say beyond a reasonable doubt that the improper argument did not contribute to the convictions. The defense of consent admittedly was not a strong one. Yet by the same token it was not frivolous." 583 F.2d, at 707.

In the case at bar, as in Miller, supra, the improper closing argument may very well have contributed to the conviction because of the implication of bribery and wrongdoing by the defendant. Neither was defendant's defense frivolous. The right to a fair and impartial jury is so substantial as to preclude speculation on the weight given by the jury to the improper arguments as the Court of Appeals

did in their opinion.

IV. THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY CONCERNING THE NEED TO FIND THE ELEMENT OF "COUNTERFEIT."

The Court of Appeals in their opinion state that there is no need to define "counterfeit" beyond the jury's own understanding of the word. However, the volume of decisions on this point belies the falsity of that statement. As indicated in Petitioner's argument on the first issue, the word "counterfeit" has become a term of art defined by the Courts as "such a resemblance to a genuine bill as to be calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." 159 F.2d, at 802. A juror would assume that anything that is not real is

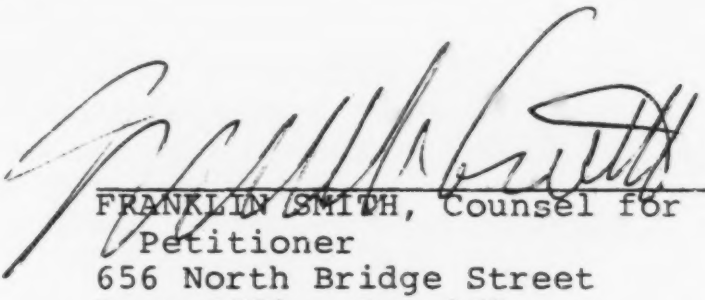
counterfeit which is contrary to the holding in Lustig and Smith, supra.

CONCLUSION

The defendant contends, based upon the foregoing facts, arguments, and the cases cited as authority and the authorities relied upon by the Court in the cases cited by the defendant, that: (1) the trial court improperly denied defendant's motions for dismissal of the charges because the Government failed to prove that the bills allegedly purchased by the defendant were passable and thus capable of deceiving the oridinary person; (2) the trial court improperly allowed the prosecution to cross-examine Mable Wagoner as to whether she had been offered money to testify for the defendant; (3) the trial court committed prejudicial error in not giving curative instructions after the prosecuting attorney improperly and prejudicially sought to prove an element

of the offense, with which the defendant was charged, by arguing evidence not properly before the jury and; (4) the trial court erred by refusing to define "counterfeited" as an element of the crime with which the defendant was charged.

Respectfully submitted, this the 29 day of October, 1984.



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5297

United States of America,

Appellee,

v.

J. D. Porter,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, Chief Judge. (CR 83-25-7)

Argued: July 13, 1984

Decided: September 5, 1984

Before PHILLIPS, MURNAGHAN, and ERVIN, Circuit Judges.

Franklin Smith for Appellant; Kenneth D. Bell, Assistant United States Attorney, (Charles R. Brewer, United States Attorney, on brief) for Appellee.

PER CURIAM:

J. D. Porter appeals his conviction on November 30, 1983, for violation of 18 U.S.C. § 473, which provides, "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." Porter presents four separate issues on appeal, including trial court error 1) in refusing to grant his motion for dismissal at the close of the Government's evidence, 2) in refusing to instruct the jury on the need to find the element of "counterfeit" to support a conviction under 18 U.S.C. § 473, 3) in permitting the prosecutor to cross-examine a defense witness, Mabel Wagoner, as to whether she

had been paid to testify, and 4) in failing to give a curative instruction after the prosecutor's allegedly "improper and prejudicial" remarks in closing argument.

Evidence before the jury revealed that Ray Hice, Cody Hice, Thomas Faw, and David Mills, all of whom were originally indicted with Porter, had printed $250,000.00 in $20.00 counterfeit bills, all of which bore the serial number E32177653A. A bundle of bills from the printing was eventually given by Mills to a United States Secret Service Agent and was subsequently introduced as evidence at trial. Ray Hice testified that he sold $108,000.00 worth of the remaining bills to Porter for $7,200.00.

The prosecution also produced evidence that Porter later sold those bills to one Danny Mathis for $20,000.00. Moreover, evidence was presented from which

which the jury could infer that Porter himself had hauled away the printing press used in the counterfeiting operation, storing it in a barn on his property.[1] A Special Agent of the Secret Service testified that he found the press on Porter's property, with envelopes addressed to Porter lying nearby. In addition, the press was jammed with pieces of $20.00 counterfeit bills, some bearing the partial serial number 2177653. Finally, the Special Agent testified that counterfeit bills bearing the single serial number E32177653A have been passed successfully in western North Carolina.

When viewed against this evidentiary background, the trial court's decision to deny dismissal of the charges at the close of the Government's evidence is quite well founded. Although Porter attempts to argue that the bills "failed to meet the test for counterfeit" under 18 U.S.C.

§ 473, evidence abounds to refute that contention. Relevant case law has construed "counterfeit" as "(bearing) such a likeness or resemblance to any of the genuine obligations . . . of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care

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1 Porter admitted that he rented a truck on the day in question, but offered the explanation that he used the rental vehicle to transport gasohol.

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when dealing with a person supposed to be upright and honest." United States v. Moreno-Pulido, 695 F.2d 1141, 1144 (9th Cir. 1983) (quoting United States v. Lustig, 159 F.2d 798, 802 (3rd Cir. 1947), rev'd on other grounds, 338 U.S. 74 (1949)). Given that definition of "counterfeit," the $20.00 obligations sold by Porter to Mathis plainly fit the bill.

Specifically, one Darrell Lipford testified that he accepted counterfeit bills from Cody Hice as repayment on a loan, at which time he told Hice that he "could use it in place of money" Hice owed him. In fact, Lipford's brother was later caught trying to pass some of the bills at the World's Fair and was himself convicted and sentenced on the resulting charges. Although Hice had originally doubted the quality of the bills, he testified that he was "sure that some was passed. (He) heard it was." Indeed, he rated the bills as a "four to five average" on a scale of one to ten in terms of quality.

Aside from Hice's testimony, the prosecution also presented one William Ensley, who testified that he and Mathis had passed "$200 worth" of the bills obtained directly from Porter. Most damaging of all was the testimony of a

Special Agent that "just over $37,000 in . . . identical $20 bills with the same serial numbers in the same places have been passed in various businesses in North Carolina. . . ." Indeed, some of the bills passed undetected through normal banking channels and made their way to the Federal Reserve before they were finally detected.

Even though Porter did not directly pass all of the $37,000.00 negotiated in North Carolina, those bills were produced from the same printing press and plates, so it was wholly reasonable for the jury to infer that Porter's bills were likewise passable. While it is true that this court has reversed a conviction under 18 U.S.C. § 472[2] when counterfeit bills were "just too crude to mislead" with their faint ink and backwards printing, United States v. Smith, 318 F.2d 94,

95 (4th Cir. 1963), the bills passed by Porter were not comparably crude.

In short, since the evidence did support a conclusion that the bills were "an imitation of a genuine document having a resemblance intended to deceive and be taken for the original," United States v. Pomponio, 558 F.2d 1172, 1774 (4th Cir. 1977), cert. denied, 434 U.S. 1062 (1978) (quoting United States v. Anderson, 532 F.2d 1218, 1224 (9th Cir. 1976), cert, denied, 429 U.S. 839 (1976)),[3] the district judge correctly refused to dismiss the case against Porter. See

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2 18 U.S.C. § 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned

not more than fifteen years, or both.

3 In Pomponio, the court's definition of "counterfeit" arose in the context of 18 U.S.C. § 2314, relating to the transport of fraudulently altered stock certificates.

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also United States v. Skelley, 501 F.2d 447, 451 (7th Cir. 1974), cert. denied, 419 U.S. 1051 (1974) (affirming defendant's conviction for possession of counterfeit bills, the court notes that "the fact that multiple bills bore identical serial numbers established their lack of genuineness").

Nor did the trial judge err in refusing specially to instruct the jury on the statutory term "counterfeit." Although Porter suggests that the jury itself requested such an instruction, it appears from inspection of the trial transcript that the jury did not make such a request. Since the "counterfeit"

quality of bills is a question of fact to be resolved by the jury, see United States v. Brunson, 657 F.2d 110, 114 (7th Cir. 1981), cert. denied, 454 U.S. 1151 (1981) (whether bills are sufficiently complete and similar to genuine currency is "an appropriate question of fact for the jury to determine"), and since "counterfeit" has a clearly understandable meaning to the lay juror, the district judge committed no error in refusing to instruct on that issue.

Appellant cites United States v. Smith, 318 F.2d 94 (4th Cir. 1963), and United States v. Johnson, 434 F.2d 827 (9th Cir. 1970) for the proposition that an instruction on "counterfeit" was required. However, Smith and Johnson did not explicitly mention the matter of jury instructions. Indeed, Smith merely cited to the Oxford English Dictionary

for a definition, a reference which would support the conclusion that no special instruction was necessary for the jury to understand the word in its ordinary, dictionary sense.

The district judge did instruct the jury that a violation of the statute included a willful and knowing exchange of "false, forged and counterfeited obligations of the United States . . . with the intent that the same be passed, published and used as true and genuine." Although it might have been preferable had he included a special instruction (i.e., an instruction that "counterfeit" means "calculated to deceive an honest person"),[4] that omission is harmless error at most, since the jury could rely on its own understanding of the term "counterfeit" and since there was substantial evidence of the bills'

passable quality.

Finally, Porter alleges that prosecutorial misconduct justifies reversal of his conviction, insofar as the prosecutor 1) was permitted to cross-examine the defense witness Wagoner as to whether she had been paid to testify[5] and 2) inappropriately referred to Mathis' prison

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[4] See Brunson, supra, 657 F.2d at 114 (jury was given an instruction on "the test of whether the bills were counterfeit").

[5] Specifically, the prosecuting attorney asked Wagoner, "(T)his is a delicate question, but has anyone offered you any money to testify heretoday?" When she denied having been offered an payment, she was then asked, "(I)sn't it true that sometime within the last very few days you've been offered $4000 for your testimony?" After defense counsel objected to the question and a bench conference was held, the question was withdrawn without Wagoner's answering it.

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sentence resulting from a conviction for counterfeiting. While we do not

approve a prosecutor's overstepping of the proper bounds of cross-examination or closing argument, we find that, given the facts of the instant case and the trial court setting in which they arose, any error that may have been committed was harmless. See Fed. R. Crim. P. 52 (a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

As to the questioning of Wagoner, the prosecutor based his cross-examination on evidence purportedly received from two Special Agents through a confidential source. Under the rule of United States v. Fowler, 465 F. 2d 664 (D.C. Cir. 1972), that information would justify the cross-examination on the issue of payment. The court in Fowler acknowledged that cross-examination on such matters would be proper when "the questioner (is) in

possession of some facts which support a genuine belief that the witness committed . . . the degrading act to which the questioning relates." Id. at 666. The prosecutor specifically stated to the trial judge that he "had good reason to believe that she'd been offered money for her testimony," and a subsequent letter of disclosure to the judge bolstered that contention.

It was in order to protect the confidentiality of its source that the Government chose to identify its informant by means of a "letter of disclosure" to the district judge. That letter was not made part of the record on appeal. We are, however, satisfied that the district judge properly reviewed the contents of that letter, albeit after the cross-examination of Wagoner was completed, and determined that the informant did,

in fact, provide the Government with information that justified the cross-examination on the issue of payment.

Moreover, it is unnecessary at this point that Porter be supplied with the name of the informant. See Roviaro v. United States, 353 U.S. 53, 59 (1957) (the common law "informer's privilege" allows the Government "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law"); and United States v. Alonzo, 571 F.2d 1384, 1387 (5th Cir. 1978), cert. denied, 439 U.S. 847 (1978) ("It is well settled that the government is not required to disclose the identity of an informant who is a mere tipster and not an active participant in the offense charged"). Although Roviaro would require disclosure when it "is relevant and help-

ful to the defense of an accused, or is essential to a fair determination of a cause," 353 U.S. at 60-61, such is not Porter's situation. Wagoner had been called by the defense to testify that she only saw "barrels" (not a printing press) being loaded into a truck by Porter. The fact that a truck was at one time in a day loaded with barrels in no way forecloses the possibility of a prior or subsequent carriage of a printing press. That testimony was, hence, at best tangential to the defense. Moreover, there was sufficient evidence to convict Porter even if Wagoner's testimony had been wholly true and believed by the jury. As such, the line of questioning constituted harmless error, to be disregarded under Fed. R. Crim. P. 52(a).

Such is also the nature of the trial court's failure to give a curative

instruction, which may alone justify our refusal to consider the issue on appeal. See 3 C. Wright, Federal Practice and Procedure § 555 (1982). In any case, it seems clear that the trial judge committed no error in refusing to give a curative instruction sua sponte, given the context in which the prosecutor's remarks were uttered.

Porter's own attorney closed his argument by accusing the Government of "throwing sand" in the jury's eyes by referring to a "phantom criminal" (ostensibly Mathis): "they haven't produced who the real man is that ought to have been produced." In immediate response to the fairly heated argument by defense counsel, the prosecutor opened his own closing argument by observing, "(T)he integrity of the United States Attorney's office and my personal integrity

has been attached. . . . Now the defense attorney . . . passionately pled to you that he wants Mr. Mathis here, who bought the money from J. D. Porter. Where is Mr. Mathis? He's getting off scott free. Mr. Mathis is serving a seven-year prison sentence."

It is true that the fact of Mathis' prison sentence was not made part of the evidence of the case in chief, and the Government concedes in its appellate brief that the prosecutor made "an inappropriate statement" from which he "should have refrained." However, the defense counsel himself had referred several times to the absence of Mathis at Porter's trial, and the prosecutor prefaced his remarks by making it clear that he was defending against what he perceived to be an "attach on the integrity" of his office. Especially

since "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor," Smith v. Phillips, 455 U.S. 209, 219 (1982), affirmance of Porter's conviction is proper. The weight of the evidence against him was substantial, and the prosecutor's conduct was not particularly egregious.[6]

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6 Contrast Viereck v. United States, 318 U.S. 236, 247 (1943) (prosecutor made a closing argument to a wartime jury in an "agent of foreign principals" case that "could only have been to arouse passion and prejudice"); and Miller v. North Carolina, 583 F.2d 701, 707 (4th Cir. 1978) (prosecutor's appeal to racial prejudice "in the context of a sexual crime, (where) prejudice (is) so virulent," deprived appellants of a fair trial).

This Circuit has previously recognized, as was observed in Smith, that the aim of due process "is not punishment of society for the misdeeds of the prosecutor

but the avoidance of an unfair trial to the accused." Id. (quoting Brady v. Maryland, 373 U.S. 83 (1963)). In United States v. Harrison, 716 F.2d 1050, 1051-52 (4th Cir. 1983), the Court reemphasized that "(w)hether improper argument by government counsel has so prejudiced the trial process as to require reversal must be gauged from the facts of each trial," and concluded that the relevant factors to be considered are: 1) tendency of the remarks to mislead the jury and prejudice the accused, 2) whether the remarks were isolated or extensive, 3) strength of competent proof to establish guilt, and 4) whether the remarks were deliberately placed before the jury to divert attention to estraneous matters. Id. at 1052.

In the case before us, 1) the reference to Mathis was not misleading

and not overly prejudicial to Porter, 2) the remarks were an isolated, one-time occurrence, 3) there was substantial evidence of Porter's guilt otherwise before the jury, and 4) although the remarks were made deliberately, they were uttered with the express purpose of defending the attorney's office against "attack." The perception of "attack" was not farfetched. Given these considerations, Porter was not denied a fair trial by the prosecutor's closing argument. Compare United States v. Blecker, 657 F.2d 629, 636 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1981) (the court notes that a "combination of mitigating factors" (e.g., prosecutor's remark was ambiguous, and a curative instruction was given) led to the conclusion that the remarks did not constitute reversible error, especially since "this was not a

close case").

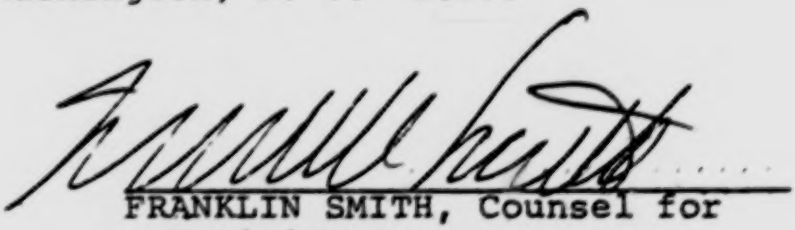
Since all four of Porter's allegations of error are without merit, the judgment of the district court is hereby

AFFIRMED.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States of America was duly served upon opposing counsel by depositing a copy of the same with the United States Mail at the Post Office in Elkin, North Carolina, in an envelope, with postage prepaid, addressed as follows:

Solicitor General
United States Department of Justice
Washington, D. C. 20530



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